

IN RE J & L SPECIALTY PRODUCTS CORP.

NPDES Appeal No. 92-22

FINAL ORDER

Decided June 20, 1994

Syllabus

On February 2, 1994, this Board granted review and sought briefs concerning two subjects raised in a petition for review of the NPDES permit issued by U.S. EPA Region V to J&L Specialty Products Corp. ("J&L") for its Louisville, Ohio facility.

Specifically, the Board granted review of whether it has the authority to review listing decisions made pursuant to Clean Water Act section 304(l), 33 U.S.C. § 1314(l), and asked the parties to brief three issues: Are section 304(l) listing decisions administratively reviewable? If so, when? And if so, can they be reviewed apart from a challenge to an NPDES permit condition implementing section 304(l)? Both parties state that listing decisions are subject to some type of "administrative review," and both parties agree that these NPDES permit proceedings are the proper vehicle for administratively reviewing listing decisions. Concerning the third question, J&L contends that administrative review is appropriate even if the permit contains no conditions based on a listing decision, while the Region asserts that a listing decision can be administratively reviewed only in the context of a challenge to a specific permit condition that allegedly resulted from the listing decision.

The Board also directed the parties to brief the issue of whether J&L discharges cyanide into the receiving waters as the term "discharge of pollutants" is defined in Clean Water Act section 502(12), 33 U.S.C. § 1362(12), assuming that the facts are as represented by J&L. These facts are that J&L's industrial process is not the source of the cyanide in J&L's process wastewater discharge, but the source of the cyanide is roadsalt washed into J&L's stormwater sewer system. The cyanide appears in J&L's process wastewater discharge because J&L uses some of the stormwater it collects to meet its process intake water needs.

Held: Listing decisions under section 304(l) are not subject to direct review by this Board. The applicable regulations make no provision for Board review of listing decisions while providing for review of NPDES permits. Listing decisions are merely preliminary steps in determining permit conditions, and thus should not be reviewed by this Board prior to or apart from permit issuance. Because review under 40 C.F.R. Part 124 is limited to challenges to particular permit conditions, it is the permit condition allegedly based on the listing decision which is subject to review, rather than the listing decision *per se*. However, if a permit condition is adopted based upon a listing decision, a petitioner can allege that the permit condition attributable to the listing decision be set aside because of legal or factual errors in the listing decision, and thereby collaterally attack the listing decision.

Here, J&L attempts to obtain review of the listing decision by arguing that the Region lacked a basis to assume the authority to issue this permit under 40 C.F.R. § 123.46(f), which